Supreme Court, U.S.
FILED
APR 7 2003
OFFICE OF THE CLERK

No. 02-1097

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

JUAN RAMON ROMO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

---

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR *
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

April 7, 2003

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

TABLE OF CONTENTS

Page

Table of Authorities ii
Interests of Amici Curiae 1
Statement of the Case 2
Reasons for Granting the Petition 3

I. This Court Should Grant Review to Make it Clear That the Overall Wealth of the Defendant Corporation May Not Be Taken into Account in Assessing or Reviewing Punitive Damage Awards; to Do So Would Be Inconsistent with Due Process, the *BMW* Guideposts, and the Purposes of Punishment and Deterrence 4

A. Imposing Large Punitive Damage Awards Based upon the Wealth of a Corporate Defendant Does Not Serve the Principles of Punishment or Retribution 7

B. Basing and Justifying Huge Punitive Damage Awards on the Company's Overall Wealth Does Not Properly Serve Deterrence Principles 12

C. Even If the Jury Can Consider Financial Information of the Corporation, the Relevant Information Is the Gain Realized Attributable to the Wrongful Conduct that Occurred Within the State; Anything More Violates Due Process and Exceeds Deterrent Interests of the State . . . 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases:

Brown v. Legal Foundation of Washington,
2003 U.S. LEXIS 2493 10
City of Newport v. Fact Concerts, Inc.,
453 U.S. 257 (1989) 8, 9
Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) . . . . . *passim*
BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) . . . . . *passim*
Hensley v. Paul Miller Ford, Inc.,
508 S.W.2d 759 (Ky. Ct. App. 1974) 5
Honda Motor Co., Ltd. v. Oberg,
512 U.S. 415 (1994) 6
Kimzey v. Wal Mart Stores, Inc.,
107 F.3d 568 (8th Cir. 1997) 17
Lane v. Hughes Aircraft Co.,
22 Cal.4th 405, 993 P.2d 388 (2000) 9, 15
Michigan Peisner v. Detroit Free Press,
242 N.W. 2d 775 (Ct. App. Mich. 1976) 5
Neal v. Farmers Ins. Exchange,
21 Cal. 3d 910, 582 P.2d 980 (1978) 12, 16
Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 12
Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 12
Pivot Point International, Inc. v. Charlene Products, Inc., 932 F. Supp. 220 (N.D. Ill. 1996) 10
Smith v. Colorado Interstate Gas. Co.,
794 F. Supp. 1035 (D. Col. 1992) 5
State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. ___ (Apr. 7, 2003) 5, 15

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 6
White v. Ford Motor Co.,
312 F.3d 998 (9th Cir. 2002) 18
Yund v. Covington Foods, Inc.,
193 F.R.D. 582 (S.D. Ind. 2000) 5
Zazu Designs v. L'Oreal, S.A.,
979 F.2d 499 (7th Cir. 1992) 9

Miscellaneous:

2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury*, 255 (1991) . 11
Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth,* 18 J. Legal. Stud. 415 (1989) 14
Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*,
40 Ala. L. Rev. 1143 (1989) 13
Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*,
56 S. Cal. L. Rev. 1 (1982) 13
Lisa Litwiller, Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury,
36 U.S.F.L. Rev. 411 (2002). 11
Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 Univ. of Chicago Law Rev. 179 (1998) 13
Richard Neely, *The Product Liability Mess: How Business Can Be Rescued form the Politics of State Courts* (1989) 7
David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705 (1989) 19

Victor E. Schwartz, *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brooklyn L. Rev. 1003 (1999) . 6
Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 Williamette L. Rev. 635 (1994) 7
Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919 (1989) 13

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. Many of its supporters are consumers and shareholders of Ford Motor Company and other publicly traded companies; accordingly, they would be adversely affected by the award of the excessive punitive damages in this and other cases.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as amicus curiae in almost all of the major punitive damages cases before this Court, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

In addition, WLF has published numerous articles on punitive damages. *See, e.g.*, Arvin Maskin, *et al.*, *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Found. Monograph, 1994); Victor E. Schwartz, *et al.*, *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Found. Working Paper No. 50, 1992); Theodore B. Olson & Theodore J. Boutrous, *The*

---

[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to the preparation and submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

Constitutionality of Punitive Damages (Washington Legal Found. Legal Backgrounder 1989).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF that are relevant to this case, including *BMW of N. Am. Inc. v. Gore* and *Pacific Mut. Life Ins. Co. v. Haslip*.

WLF and AEF believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding whether to grant the Petition. Amici believe that the arguments presented in their brief also provide compelling reasons for granting review in the companion case of *Ford Motor Company v. Smith*, No. 02-1096. Consequently, amici urge the Court to grant both Petitions.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented in the Petition. In brief, this case involves the constitutionality of a punitive damages award of $290 million to the plaintiffs as a result of injuries and deaths suffered from a single automobile accident that occurred in 1993 when the roof of a 1978 Ford Bronco they were riding in collapsed during the rollover.

The court of appeal upheld this unprecedented award which was approximately 63 times the compensatory award, 362 times the maximum available civil fine, and 29,000 times the maximum criminal fine. The California Supreme Court denied review by a vote of 4-3.

REASONS FOR GRANTING THE PETITION

In *BMW v. Gore*, 517 U.S. 559 (1996), this Court held that in order to pass muster under the Due Process Clause, the size of punitive damage awards must be measured against three guideposts: (1) the degree of reprehensibilty of the tortious conduct; (2) the disparity or ration between the harm and the punitive damages awarded; and (3) the level of civil or criminal penalties that could be imposed in comparable cases. To help ensure that these guideposts are not easily ignored, this Court in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), held that a reviewing court must conduct a searching *de novo* review of the *BMW* excessiveness factors.

In the instant case, the jury imposed, and the appellate court upheld, a gargantuan punitive damages award of $290 million, unprecedented even by California standards, for a design defect in the roof of Ford's 1978 Bronco which was involved in an accident 15 years later. The jury concluded that a defective roof design was a cause of the injuries and deaths suffered by the vehicle's occupants. While the Petitioner presents compelling reasons why this Court should review and reverse the award as a clear violation of the *BMW* guideposts and the proper level of judicial review under *Cooper Industries*, amici will focus their brief on the related issue raised by the Petitioner, namely, that the *BMW* guideposts cannot be easily disregarded by a jury or a reviewing court by considering the wealth of the corporate defendant. The wealth of the defendant is irrelevant for determining either the appropriate punishment or retribution to be meted out, as well as for determining the amount necessary for deterrence purposes.

Alternatively, if the Court believes that the financial information regarding the defendant can be used in computing the punitive damages award, it should make it

clear that the relevant information that may be used consistent with due process are the profits associated with the particular tortious conduct in question, namely, the costs saved from Ford's failure to adopt an alternative design that would have allegedly prevented the injuries. Even if the entire profits from the product can be considered instead of the differential in the cost savings from the roof design, the out-of-state conduct and associated profits cannot be considered in computing punitive damages as the lower court mistakenly did.

I. THIS COURT SHOULD GRANT REVIEW TO MAKE IT CLEAR THAT THE OVERALL WEALTH OF THE DEFENDANT CORPORATION MAY NOT BE TAKEN INTO ACCOUNT IN ASSESSING OR REVIEWING PUNITIVE DAMAGE AWARDS; TO DO SO WOULD BE INCONSISTENT WITH DUE PROCESS, THE *BMW* GUIDEPOSTS, AND THE PURPOSES OF PUNISHMENT AND DETERRENCE.

In the instant case, the lower court upheld the $290 million punitive damages award which it characterized as a "huge windfall" to the plaintiffs (and their attorneys), because "California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence." Pet. App. 36a. The court considered Ford's net worth of $25 billion, and its daily after-tax profits of $20 million. *Id.* Nationwide profits of the 1978 and 1979 Broncos amounted to $100 million. The court then sought to minimize the $290 million windfall because the amount represented only "1.2 percent of Ford's net worth and nine days of its profits at the time of trial." Pet. App. 37a.

California is not unique in considering the wealth of the corporate defendants to justify huge punitive damage awards, and more juries and courts will likely follow California's example if this decision goes unreviewed. As the Petitioner noted, other lower courts have justified multi-million dollar punitive damage awards on the basis of the large wealth of the corporate defendant. *See* Pet. at 20, n.10 (citing cases upholding multimillion dollar punitive damages awards based on wealth of the defendant). However, other jurisdictions (including those in which thousands of 1978 and 1979 Ford Broncos were sold) forbid consideration of wealth of the defendants.[2]

Unfortunately, faced with tempting opportunities to redistribute wealth from large corporations (particularly from those that are out-of-state) to individual plaintiffs, the lower court and many other courts are barely paying lip service to the *BMW* guideposts, let alone conducting meaningful *de novo* review as required by *Cooper Industries*. Accordingly, this case presents the Court with an excellent opportunity to curb the not-so-subtle violations of the due process rights of "wealthy" defendants.

As this Court reiterated just today, "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003), slip op. at 17. On prior occasions, this Court and many of its Justices have observed that the imposition of punitive damages "pose an

---

[2] *See, e.g., Michigan Peisner v. Detroit Free Press*, 242 N.W. 2d 775 (Ct. App. Mich. 1976); *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974); *Smith v. Colorado Interstate Gas. Co.*, 794 F. Supp. 1035, 1044 (D. Col. 1992). *Yund v. Covington Foods, Inc.*, 193 F.R.D. 582, 589 (S.D. Ind. 2000) (holding that "a corporate defendant's net worth is irrelevant to the assessment of punitive damages against it").

acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth create the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences." *Honda v. Oberg*, 512 U.S. at 432; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (Rehnquist, C.J., Blackmun, Stevens & Kennedy, JJ.) ("[E]mphasis on the wealth of the wrongdoer increase the risk that the award may been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."); *id.* at 490 (White, O'Connor & Souter, JJ. dissenting) ("That a jury might have such inclinations [to redistribute wealth form large corporations] should come as no surprise. Courts long have recognized that jurors may view large corporations with great disfavor."). As one commentator noted:

> Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "'other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.'"

Victor E. Schwartz, *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brooklyn L. Rev. 1003 at 1006 (1999).

Not only are jurors prone to exact large punitive damage awards against corporations because of their size, judges are also prone to sanction the practice. Judicial review by state courts cannot be relied upon to remove the risk of excessive punitive damage awards against large out-

of-state corporations due to bias. Judge Richard Neely, author of the opinion of the West Virginia Supreme Court of Appeals in the *TXO* case, has candidly explained the pressures on state judges as follows:

> After all, I'm not the only appellate judge who wants to sleep at night. As long as I'm allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone elses' money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me.

Richard Neely, *The Product Liability Mess: How Business Can Be Rescued form the Politics of State Courts* 4 (1989), *quoted in* Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 Williamette L. Rev. 635, n.306 (1994).

Amici submit that this Court should grant review in this case to clarify that consistent with due process, the wealth of the defendant cannot be used to justify huge punitive damage awards.

A. Imposing Large Punitive Damage Awards Based upon the Wealth of a Corporate Defendant Does Not Serve the Principles of Punishment or Retribution

Under California law and the law in many other jurisdictions, punitive damages are awarded to punish the defendant and to deter it and others from engaging in the offending or harmful conduct. The purpose of punishment or retribution is to inflict only the level of sanctions necessary to vindicate societal interests in condemning the offending conduct that occurred in the past. Deterrence, on

the other hand, is designed to prevent the defendant and others from engaging in the offending conduct in the future. A penalty imposed for deterrence purposes, however, can also serve a punitive function.

A proper analysis of these two rationales for imposing punitive damages suggest that wealth of the defendant cannot, and should not, be taking into account, particularly where, as here, the defendant is a large publicly held corporation. This Court's discussion in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 257 (1989) about the appropriateness of imposing punitive damages upon municipal corporations is instructive with regard to the question of imposing punitive damages on commercial corporations.

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. * * * Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. * * * A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the

> governmental entity itself. * * * Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.

City of Newport, 453 U.S. at 267 (footnote omitted).

Amici submit that just as with municipal corporations, punishing large publicly-held corporations like Ford inflicts punishment "only [on] the [shareholders], who took no part in the commission of the tort." 453 U.S. at 267. Furthermore, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [shareholders]. *Id.* Finally, since a corporation is a fictional entity, it "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id.* As Circuit Judge Easterbrook noted:

> Corporations * * * are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992). *See also Lane v. Hughes Aircraft Co.*, 22 Cal.4th at 427 (Brown, J., concurring) ("Many of the wealthiest defendants are corporations, and the size of a corporate

defendant is not an additional evil that in itself warrants an enhance penalty.").

Even though the *Zazu* case dealt with punitive damages based on federal law, the principle should apply to state law claims as well. As Judge Easterbrook subsequently observed, "even when considering punitive damages based on state law [*in BMW*], the Supreme Court did not treat the defendant's wealth as relevant. Basing a decision [regarding punitive damages] on income and assets not only is inconsistent with the privacy interests that usually protect those details * * * but also calls into question the courts' commitment to do equal justice to the rich and the poor.[3] *Pivot Point International, Inc. v. Charlene Products, Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

The American Law Institute Reporters also have presented cogent reasons as to why a defendant's assets are irrelevant to the issue of punitive damages:

> The defendant's assets are irrelevant for several reasons. First, most sizable corporations deploy their wealth in a variety of unrelated business ventures; in deed, it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity. Second, use of the wealth factor may impose unjustifiable sanctions on corporations which incur proportionately more instances of wrongdoing simply because of their greater *volume* of business.

---

[3] *Cf. Brown v. Legal Foundation of Washington*, 2003 U.S. LEXIS 2493 at *59 (Scalia, J., dissenting (criticizing the majority's "Robin Hood Taking[s]" Clause as sanctioning the extraction of wealth from those who own it to fund indigent legal services).

> Finally, the actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury*, 255 (1991).

Amici submit that the "wealth card" dealt by plaintiffs' lawyers to the jury and "reviewed" by the appellate court should not trump the rational guideposts provided by this Court in *BMW*. The resulting awards appear to be, and most likely are, based on passion and prejudice, and result in wildly disparate awards in lottery-like fashion, depending upon the fortuity of the forum and composition of the jury.[4] This Court should not tolerate this arbitrary basis for huge punitive damage awards any more than the court should

---

[4] One commentator noted with regard to the role of the jury:

> According to the Court [in *Cooper*], "unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." If one takes this statement at face value, litigants no longer have a right to have a jury determine the amount of punitive damages. To the extent that modern juries function solely as fact finders, the assessment of a punitive damage award, at least as to the amount, is outside the purview of the jury.

Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F.L. Rev. 411 (2002).

tolerate the imposition of a large criminal fine on a defendant simply because he could afford it.

The court below dismissed the due process objection to the use of Ford's wealth in the punitive damages calculus on the grounds that Ford was on notice that wealth of a defendant is a factor under California law and California court decisions such as *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 582 P.2d 980 (1978). But clearly Ford had no notice of what its wealth would be some 20 years after the alleged misconduct occurred. Furthermore, the notice by the government that it intends to act in an arguably arbitrary and unconstitutional way in the future does not constitute sufficient notice to cure the underlying due process violation.[5]

B. Basing and Justifying Huge Punitive Damage Awards on the Company's Overall Wealth Does Not Properly Serve Deterrence Principles

The usual reason given for imposing multimillion dollar punitive damages awards is that a wealthy company will internalize those costs as simply a cost of doing business. But that simplistic reaction often goes unchallenged. Assuming that a company and its officers are motivated purely by economic greed and the bottom line, it doesn't

---

[5] For example, in the context of deciding whether the Takings Clause has been violated in a particular case, the government's argument that the property owner had no investment-backed expectation because the property was acquired *after* the (confiscatory) regulation was enacted, and thus the new owner had notice, is no bar to a claim by the owner that a regulatory taking has nevertheless occurred. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n.2 (1987).

make sense for a company to continue to engage in liability causing conduct until the punitive damage awards reach astronomical proportions. While the lower court may have been correct in observing that determining the proper amount of a punitive damage award is not an exact science, there remains a substantial body of scholarly economic research suggesting that the optimal levels of fines necessary to deter socially undesirable conduct are not related to the size or net wealth of the company. From an economic point of view, it is generally understood that:

> [P]rofit-maximizing organizations are interested in the marginal (not the total) costs of activities relative to the marginal benefits. The total wealth of the organization generally has little to do with the expected marginal costs or benefits of actions. It has been argued that, by linking punitive damages to wealth, the law creates too much deterrence for large corporations and too little for small ones.

Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 Univ. of Chicago Law Rev. 179, 210 (1998).[6] As explained by two prominent experts in the field:

> Deterrence theory is based on the * * * assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action

---

[6] *See also* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1176-77 (1989); *Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 62 (1982).

> that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct.

Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth,* 18 J. Legal. Stud. 415 (1989). Deterrence is deemed effective if it removes the gain from the wrongful behavior, regardless of its net worth, assets, or income. As Judge Easterbrook cogently described it:

> Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings? Absolute size, like net worth, also is a questionable reason to extract more per case. * * * If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger

> than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none.

Zazu, *supra*, 979 F.2d at 507. Stating it more succinctly, it's "as if having a large net worth were the wrong to be deterred!" *Id.* at 508.

If deterrence is the goal, that goal can be achieved with a large compensatory award and no, or a relatively small, punitive damages award. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. ___ (Apr. 7, 2003), slip op. at 18 (in light of substantial compensatory damages awarded, a punitive damage award "at or near the amount of compensatory damages" could meet the *BMW* standards). As one California Justice observed:

> [E]ven for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct. Moreover, above a certain level, the precise amount of a defendant's wealth becomes less relevant, compared to other factors, in determining an appropriate punitive damage award. Accordingly, trial courts should not permit attorneys to argue [or reviewing courts to sanction] that punitive damages should be a fixed percentage of the defendant's total net worth.

Lane v. Hughes Aircraft Co., 22 Cal.4th at 427 (Brown, J., concurring).

C. Even If the Jury Can Consider Financial Information of the Corporation, the Relevant Information Is the Gain Realized Attributable to the Wrongful Conduct That Occurred Within the State; Anything More Violates Due Process and Exceeds the Deterrent Interests of the State.

To protect the due process rights of defendants and to serve the interests of the State in achieving deterrence, it is vitally important that trial courts and reviewing courts carefully assess the amount of the punitive damage award to ensure that it is not excessive. As this Court said in *BMW*, the "sanction * * * cannot be justified on the ground that it was *necessary* to deter future misconduct *without considering whether less drastic remedies* could be expected to achieved that goal." 517 U.S. at 584 (emphasis added). This standard is similar to the standard required under California law as stated by the court below: "'The key question before the reviewing court is whether the amount of damages 'exceeds the level *necessary* to properly punish and deter.'" Pet. App. 34a (*quoting Neal v. Farmers Ins. Exchange*, *supra,* 21 Cal. 3d at 928 (emphasis added). Stated differently, both California law and due process principles forbid the imposition of punishment that *exceeds* the level "necessary" to accomplish its goals of punishment and deterrence. If the punishment is excessive, it becomes gratuitous, arbitrary, overdeters, and violates due process.

The lower court in the case at bar shirked its duty under *Cooper Industries* to scrutinize the punitive damages award *de novo* by stating the obvious: "It is empirically impossible, of course, to know *exactly* the level of punitive damages that would have a sufficient punitive and deterrent effect without unduly stifling innovation and competition in the marketplace." Pet. App. 36a. Claiming that any determination of the award is "somewhat arbitrary," the

court simply deferred to the judgment of the jury and trial court. The court noted that because Ford allegedly "had use of its 1978-79 Bronco profits of over $100 million for 20 years prior to the verdict, we cannot conclude the level of damages is excessive." Pet. App. 37a. But even assuming that these nationwide profits are indeed relevant at all to the calculus, the court did not even bother to consider whether "less drastic remedies" would be sufficient to punish and deter; instead, the court arbitrarily relied on Ford's nationwide Bronco profits.

Unlike the court below, other courts have taken heed of *Cooper's de novo* review responsibilities. In *Kimzey v. Wal Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997), for example, the plaintiff successfully brought a sex discrimination claim against Wal Mart for the repeated and grossly offensive conduct constituting sexual harassment which went unremedied by management. The jury awarded $35,000 in actual damages for constructive discharge and $50 million in punitive damages. The trial court reduced the punitive damages to $5 million, and on appeal, the Eighth Circuit reduced it further to $350,000. Even though Wal Mart had net assets at the time of $32 billion, the punitive damage award amounted to roughly .001% of the net assets. (A comparable percentage in this case based on Ford's net worth of $25 billion would amount to $250,000).

Even though the jury was given general instructions under Missouri law that punitive damages were to both punish and serve as a deterrence, the trial court properly set aside 95% of the original $50 million award, and on appeal, the reviewing court reduced the $5 million by 93% more to arrive at $350,000. To be sure, the ratio of punitive to actual was a seemingly large 10 to 1, but the actual damages was not in the multimillion dollar category where much smaller ratios under *BMW* serve as a important guidepost.

In the case at bar, the court of appeal did not consider whether a smaller punitive damage award of, say, $100 million, or $50 million, or even $10 million, would necessarily serve the principles of punishment and deterrence. As far as the court was concerned, the comparable fines guidepost in *BMW* was inapplicable because a death occurred, and the reprehensibility factor in the case could override all other considerations. Under the lower court's rationale, if the jury had returned a $500 million, or even a billion dollar punitive damages award as requested by the plaintiffs' attorney, that would be just fine with the court as well. While it may be "empirically impossible" to know the "exact" level of proper punitive damage, clearly the court could have determined whether the award was even in the ballpark in the order of several magnitudes. *De novo* review must certainly mean more than what the lower court engaged in.

Amici also agree with Petitioner that this Court should clarify the constitutional limits on the power of the State to punish out-of-state sales and profits, consistent with principles of federalism and the Commerce Clause. The issue is especially appropriate for review in light of a clearly conflicting opinion in *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) where nationwide sales of the defective vehicle could not be considered.

But even if the jury and the court could measure the punitive damages on the basis of the number of vehicles, either in California or nationwide, the proper and more accurate measure for deterrent purposes should be marginal costs saved, not the entire profits from the product. In *Copper Industries*, this Court quite correctly recognized that the punitive damages should be correlated not to the entire sales of the product in question, but only to the profits associated with the misconduct at issue. 532 U.S. at 442. In this case, the record shows that the cost savings between

the "defective" roof design and the one offered by the plaintiffs' expert was $10-12 a roof. The amount of cost savings would have been $1.8 million. Pet. at 23.

In any event, even if total Bronco profits are the right measure, the court below brushed aside the allocation of in-state versus out-of-state sales by Petitioner because "any 1978 Bronco operated *on California highways* creates the same risks to its occupants no matter where the vehicle was sold nor where its occupants reside." (emphasis added). Yet this falsely assumes that *all* 150,000 Ford Broncos sold in 1978 and 1979 were sold in and/or operated on California highways. For this reason alone, Ford's due process rights were violated by punishing Ford for extraterritorial conduct. For all we know, and for all the lower court could care, the 1978 Bronco in the case at bar could have been the only one sold in or operated on California highways.

CONCLUSION

This Court should not shirk from its responsibility to enforce its decisions that substantively limit the award of excessive punitive damages. As one commentator has noted:

> If society constructs rules of law that are known to inflict punishment that is undeserved, the community itself is guilty of a kind of theft.
>
> * * *
>
> Legal thefts seem even more pernicious than private thefts because of the more active role of the community in accomplishing them: they are "group thefts," which violate the trust of individual citizens that the law will be as fair as possible in concept and execution.

David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 723 (1989).

To allow an award of this magnitude to go unreviewed for conduct where experts differ as to the fault of defendant, where the jury vote as to whether it should even assess punitive damages was 9-3, and where the Supreme Court of California itself declined review by a narrow 4-3 vote, would be to endorse the arbitrary deprivation or theft of property belonging to the shareholders of Ford without due process.

For the foregoing reasons, and those presented by the Petitioner, the petition for writ should be granted.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: April 7, 2003